In The

Supreme Court of the United States

October Term, 1976

No. 76-158

ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY, INC.,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Inasmuch as the brief submitted on behalf of the Respondent contains serious misstatements of material facts appearing in the trial record, Petitioners Andrew Valentine and Valentine Electric Company, Inc., are constrained to submit this reply brief.

At page 6 of its brief, Respondent, in attempting to summarize the facts, states that "Valentine then gave Sutton $200,000 in cash in return for a $270,000 check (VII Tr. 1576-1582)." A careful reading of the pages cited by the Respondent, as well as the entire trial record, indicates, however, that this assertion is bereft

of factual support and entirely erroneous. Clearly, Sutton stopped the check and was never paid for it by Valentine (V Tr. 1594-1596).

A second misstatement of the record facts occurs at page 14 where Respondent, purporting to address the issue raised as to the bias of the District Judge, (Valentine Petition, pages 17-24),* states that,

> "Since the trial judge's earlier statements had not focused upon petitioners, it is difficult to perceive how he could have entertained a closed mind on the merits of . . . [their] case" (citing).

Lest there be any doubt, Andrew Valentine, as well as his namesake, Valentine Electric Company, were *each* named in the indictment, tried and convicted. Although Andrew Valentine was sentenced to the *maximum* jail term and fine permissible under law, Valentine Electric Company also was sentenced to pay the *maximum* fine permissible. Both Andrew Valentine and Valentine Electric Company have petitioned this Court and *both* are in law and fact petitioners.

Further, lest there be any doubt, during his tenure as United States Attorney for New Jersey, the District Judge consistently and unequivocally singled out the *Valentine Electric Company*—the very petitioner herein —as the subject of criminal investigation (Valentine Petition, pages 18-19). Indeed, given the public pronouncements and irrefutably jaundiced actions of the District Judge during his tenure as United States Attorney for New Jersey, we submit, there existed *not merely reasonable support* for the disqualification of the District Judge—the quantum of proof required by 28 U.S.C. 144

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* No. 76-158.

—but, an *irrefutable factual basis* for Petitioners' assertion that the District Judge should have disqualified himself (Valentine Petition, pages 18-19).*

In light of the record facts, the assertion by Respondent at page 14 of its brief that ". . . the trial judge's earlier statements had not focused upon *petitioners*" (emphasis supplied) truly falls outside the bounds of fair and proper advocacy. Rather than fairly confronting the crucial and decisive issue of the bias of the District Judge towards Valentine Electric Company and its principals, Respondent has simply chosen to disregard the corporate entity as a petitioner and to deny its existence. Indeed, even the Court of Appeals, whose determination we sincerely urge this Court to review, could not deny the allegations of demonstrable prejudice by the District Judge towards Valentine Electric Company and felt compelled to conclude that it raised a difficult problem (Valentine appendix, pages 24a-25a).

At page 15 of its brief, Respondent refers to a hearing between the District Judge and counsel who brought the recusal motion on the initial indictment handed down herein.** To state, as does Respondent, that "the trial judge did not contest the accuracy of the facts alleged in the first Section 144 affidavit; he simply inquired . . .", we submit, makes a mockery of the record facts.

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* For example, the *Newark Evening News, October* 9, 1969, quoted the District Judge as follows:

> "I say this—any competitor of Valentine, or any businessman who has reason to complain of Valentine's methods need only come to me. I'll order a complete investigation . . . Let's start with one simple step. Send me your rumors, your beliefs. Let us investigate them" (I Tr. 81).

** This hearing extended over two days (XI Tr. 1-100, I Tr. 108-170).

Plainly put, the hearing alluded to by Respondent represented nothing less than a full-blown inquisition replete with recriminations by the District Judge who, in defiance of 28 U.S.C. 144 and the holdings of this Court and the Courts of Appeals, *impermissibly subverted* the truth of the affidavit submitted in support of the recusal motion as well as the good faith of counsel who had brought the motion (Valentine Petition, pages 19-24; Respondent's Brief, page 14, footnote 10).

Central to this inquisitorial hearing was the assertion by the District Judge that because an opinion, which assertedly reflected his thinking, was given by a member of his staff at the Office of the United States Attorney in late 1970 to the law firm of Lum, Buinno and Thompkins, at their behest, that that firm would not be "embarrassed" by representing Valentine Electric and its principals Andrew Valentine and Joseph Diaco, his lack of bias toward Valentine Electric and its principals "now that Biancone and Boiardo were gone" became a matter of public record (I Tr. 163).

At the outset, the record reflects beyond peradventure that whatever response was given to the inquiry by the Lum law firm, it was, at best, informal and certainly clandestine, intended *not* as an official pronouncement publicly vindicating Valentine Electric and its principals but rather gratuitously and privately offered to the Lum firm to allay any potential "embarrassment" that might possibly accrue to such a prestigious firm if it represented Valentine Electric and/or its principals. Indeed, the stipulation dated September 6, 1974 and signed by Joseph R. McMahon, Esq., on behalf of the Lum law firm at the behest of the trial judge, specifically stated:

> "Of course, the United States Attorney's Office stated that it was not speaking officially and was just offering this information for whatever value the firm considered it to be" (I Tr. 137).

Moreover, despite the blockbuster tactics and strained interpretations by the District Judge at oral argument to cast doubt upon the good faith of counsel making the recusal motion and to transform the informal response privately given to the Lum firm to allay their "embarrassment" into a publicly declared "clean bill of health for Valentine Electric and its principals", the inescapable fact remains that neither the Lum firm nor the office of the United States Attorney *ever* considered the statement made to the Lum firm to be what the District Judge belatedly asserted it was. Lest this Court's attention be diverted from the *true nature and intent* of the representation made to the Lum firm by then First Assistant and now District Court Judge Herbert J. Stern, on behalf of the office of the then United States Attorney, we offer the following salient colloquy:

> "The Court: Here's the issue: I'm not concerned, really—and it's a matter with which I should not be concerned—what clients Lum, Biunno & Tompkins takes on. The point that I am making here is that you obviously had specific information of a telephone call made by a partner to my office.
>
> Mr. McMahon: Yes, your Honor.
>
> The Court: Which was designed to ascertain whether, to put it in the vernacular, my office would give Valentine Electric Company and its principals at that point following the expulsion of Boiardo and Biancone a clean bill of health.
>
> Mr. McMahon: Not quite, your Honor.
>
> The Court: All right, put in your terms.
>
> Mr. McMahon: We were engaged initially and only on a limited basis—and I might tell you that a period of time went by for over three or four months and detailed memoranda were presented to all the partners in the firm before the election

was made to go ahead and represent the company. The initial representation was just on the criminal case and before we undertook that representation the telephone call was made by Bill McGuire to Judge Stern and *it was not whether or not they were clean because, obviously, they are under investigation at the time and the investigation did continue for over a year* and I don't to this day know what quite happened with it" (I Tr. 119-120).

Contrary to the contention of the District Judge, perhaps the best evidence that the response to the inquiry of the Lum firm was not meant to indicate that Valentine Electric and its principals had been given a "clean bill of health" is that *after* the response was given to the Lum firm, the office of the United States Attorney, then under the direction of the Trial Judge, nevertheless, commenced a *new criminal investigation* into the activities of Valentine Electric and its principals (I Tr. 120).

CONCLUSION

For all of the above reasons and the reasons heretofore set forth, the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed; and a new trial should be ordered.

Respectfully submitted,

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